No. 11844

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of C. A. REED FURNITURE COMPANY, a corporation, Bankrupt,

Appellant.

vs.

LAWRENCE WAREHOUSE, a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

MCLAUGHLIN, MCGINLEY & HANSON,
JAMES A. MCLAUGHLIN,
FRANK C. WELLER,

1224 Bank of America Building, Los Angeles 14,

Attorneys for Appellant.

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Appellant.

vs.

LAWRENCE WAREHOUSE, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts.

This is an appeal by plaintiff, trustee in bankruptcy, from a summary judgment granted on motion of the defendant and appellee, Lawrence Warehouse Company.

The facts from which the issues are drawn appear in the first cause of action in the amended complaint [R. 2-40] which was filed pursuant to Rule 15, Federal Rules of Civil Procedure, before any responsive pleading had been filed to the original complaint.

The second and third causes of action relate to other preferential transactions as to which the defendant, California Bank, is solely involved, and we are not concerned with those causes of action, because that defendant did not move for a summary judgment.

The appellee's motion for a summary judgment was supported by a single affidavit of one of its officers, but

the basis of the trial court's ruling was such that this affidavit has little importance in the determination of this appeal. For brevity, we will hereinafter refer to the amended complaint as "the complaint."

By his complaint, the plaintiff sought recovery from the appellee and the defendant, California Bank, for the value of merchandise belonging to, and warehoused by the bankrupt, C. A. Reed Furniture Company, with appellee, which in turn issued its warehouse receipts for such merchandise to California Bank, the pledgee. Except for the difference in dates, serial numbers and the merchandise covered thereby, these warehouse receipts were all in identical form to the one attached to the complaint as "Exhibit A." [R. 19-20.]

Each such receipt acknowledged the receipt by appellee of the merchandise, described on the face thereof, from the bankrupt, "for the account of and to be delivered without surrender of this warehouse receipt upon the written order of California Bank."

All of the merchandise involved in these various warehouse receipts is listed on "Exhibit B" to the complaint [R. 21-36] and is alleged to have had a value of $83,808.00 at the time it was wrongfully delivered by appellee to California Bank [R. 6], the pledgee of these warehouse receipts on account of loans made, prior thereto, to the bankrupt. [R. 4-6.] The unpaid balance of such loans aggregated $89,963.37 at the time the California Bank took possession of such merchandise on June 26, 1948. [R. 4.]

C. A. Reed Furniture Company was adjudicated a bankrupt on July 11, 1947 and plaintiff was thereupon appointed its trustee. [R. 2-3.] Prior to the filing of this action, California Bank had disposed of this mer-

chandise, so appellant sought a money judgment for its value in this action.

The basis on which this recovery was sought, was that the warehouse receipts were wholly void, and therefore conferred no right upon California Bank to the merchandise covered therein. Such defendant was therefore liable to the trustee for the value of the merchandise, and appellee was also liable in damages for such value for having delivered the merchandise to one having no rights therein or thereto.

The invalidity of these warehouse receipts arose from the fact that appellee had failed to have the warehouse receipts show on their faces the rate of storage charges per month or per season as required by section 1858b of the Civil Code of California.

Section 1858f of such Civil Code makes it a felony to violate any of the provisions of that section 1858b and provides heavy penalties by fine or imprisonment or both.

Under paragraphs XII and XIII of the complaint the necessary facts are alleged to show that the bankrupt was insolvent in the bankruptcy sense at the time that possession of this merchandise was delivered by appellee to the California Bank, and at the time that this bank disposed of the same. [R. 9-12.] Knowledge on the part of both appellee and California Bank of such insolvency is also alleged. [R. 10.] The extent of such continuing insolvency is further demonstrated by allegations showing debts of the bankrupt of approximately $173,717.96 as against assets of not to exceed $25,000.00. These computations do not include debts to secured creditors who have availed themselves of such security, nor do they include actions of this character to recover asserted preferential transfers as assets.

Jurisdiction.

Jurisdiction of this appeal is conferred by section 225(c) of Title 28, U. S. C. A., which includes "controversies, and cases had or brought in the district courts under Title 11, relating to bankruptcy, . . ." This jurisdiction is also conferred by section 47a of the Title 11, U. S. C. A.

See also *Childs v. Ultramares Corp.* (Second Circuit), 40 F. (2d) 474, at 477, where it is said:

> "'Controversies' are ordinary suits in equity or actions at law between the trustee as such and adverse claimants of property; . . ."

A summary judgment is a final and appealable judgment. (*Bee Mach. Co. v. Freeman,*, 131 F. (2d) 190.)

The entire first cause of action is necessary to show jurisdiction in the sense of pleading a cause for relief in the District Court, but paragraph IV is the one that specifies the particular statutes conferring that court's jurisdiction. [R. 3-4.]

As therein alleged, the jurisdiction of the District Court over this action is conferred by sections 96(a), 96(b), 107(a) and 107(e) and 110(e) of Title 11, U. S. C. A. relating to recoveries for preferential and void transfers of property of the bankrupt.

Rule 20(a) of the Federal Rules of Civil Procedure authorizes the joinder of the two defendants in this action.

Appellant's Specification of Error.

The District Court erred in granting appellee's motion for a summary judgment and in causing such summary judgment to be entered. Stated in another way, that court erred in holding that the first cause of action did not state a cause of action.

Statement of Questions Involved.

The three legal contentions urged by appellee in support of its motion were:

(1) That the general rule, that a contract or other instrument (such as these warehouse receipts) issued or executed in violation of a criminal statute was *ipso facto* void, did not apply, because section 1858f of the Civil Code provided a civil remedy by suit for damages to anyone injured by such violation;

(2) That section 1858b and 1858f of the Civil Code had been repealed by implication when the Uniform Warehouse Receipts Act (Act 9059, Gen. Laws) was enacted in 1909; and

(3) That there was substantial compliance with the provisions of section 1858b because the warehouse receipt contained the following clause:

> "Subject to lien for storage, handling, insurance and other charges as per contract and lease with the industry served."

The decision of the District Court was predicated upon the first of the above contentions. If any of them were tenable, the judgment must stand, so we shall demonstrate that none of these three contentions are legally correct. There is not only no decision to sustain any of them, but they are each contrary to the established law.

The District Court in its decision has attempted to carve out an exception to the long standing and well established doctrine that an instrument issued in violation of a criminal statute is wholly void. There is no precedent for the rule announced by the District Court, and it is contrary to the reasoning behind all the decisions holding such instruments void.

We will deal with these three legal questions in the order in which we have previously stated them.

ARGUMENT.

POINT I.

Where an Instrument Is Executed Contrary to the Provisions of a Criminal Statute It Is Void for All Purposes. This Rule Is Not Affected by the Fact That the Statute May Also Confer Some Civil Remedy to a Party Injured.

The doctrine rendering such instruments void does not even depend upon whether a party has been injured. The document is void regardless of injury, and whether or not greater injury results from such invalidity than would flow from validity.

At the outset, it should be observed that the applicable law in testing the validity of these warehouse receipts is the law of the State of California. (8 Corpus Juris. Secundum, Bankruptcy, pp. 807 to 810.) The law of this state is so well settled on this subject of illegal contracts that it would only add confusion to enter into a prolonged consideration of the rules in all other states. It should be noted, however, that the rule in this state accords with that in the vast majority of the other states. (17 Corpus Juris. Secundum, Contracts, p. 557.)

Section 1858b of the Civil Code provides:

> "Warehouse receipts for property stored are of two classes: first, transferable or negotiable; and second, non-transferable or non-negotiable. Under the first of these classes the property is transferable by indorsement of the party to whose order such receipt was issued, and such indorsement is a valid transfer of the property represented by the receipt, and may be in blank or to the order of another. *All warehouse receipts must distinctly state on their face*

for what they are issued and its brands and distinguishing marks and the rate of storage per month or season, and, in the case of grain, the kind, the number of sacks, and pounds. If a receipt is not negotiable, it must have printed across its face in red ink, in bold, distinct letters, the word 'non-negotiable.'" (Italics ours.)

Section 1858f of that Code provides:

> "Every warehouseman, wharfinger, or other person who violates any of the provisions of sections eighteen hundred and fifty-eight to eighteen hundred and fifty-eight e, inclusive, is guilty of a felony, and, upon conviction thereof, may be fined in a sum not exceeding five thousand dollars or imprisonment in the state prison not exceeding five years, or both. He is also liable to any person aggrieved by such violation for all damages, immediate or consequent, which he may have sustained therefrom, which damages may be recovered by a civil action in any court of competent jurisdiction, whether the offender has been convicted or not."

It is the last sentence of the above section which influenced the District Court in its decision. That court lost sight of the reason for the rule which makes all such instruments void. We are not here concerned with the question whether the legislature has the power to limit or destroy a remedy which would otherwise exist from an instrument being void, because the above statute does not attempt this.

The Issuance of an Instrument Contrary to the Provisions of a Criminal Statute Renders It Void.

The rule is well established in this state, that the legislature cannot even expressly confer validity upon an instrument that is void because it violates the provisions of a criminal statute.

The case of *Berka v. Woodward,* 125 Cal. 119, involved a statute which made it a criminal offense for a city councilman to contract with the city. The plaintiff, a member of the city council, sought recovery for the value of lumber furnished the city, contending that Section 922 of the Political Code permitted such a recovery because the city council had approved the transaction, instead of repudiating it.

That section provided:

> "Every contract made in violation of any of the provisions of the two preceding sections may be avoided at the instance of any party except the officer interested therein."

In denying recovery the court said, at page 127:

> "The rule, further, is that where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it. (*Swanger v. Mayberry, supra; Santa Clara Mill etc. Co. v. Hayes,* 76 Cal. 390; 9 Am. St. Rep. 211; *Gardner v. Tatum,* 81 Cal. 370; *Morrill v. Nightingale,* 93 Cal. 458; *Wyman v. Moore,* 103 Cal. 214; *Visalia etc. Co. v. Sims,* 104 Cal. 332; 43 Am. St. Rep. 105; *Woods v. Armstrong,* 54 Ala. 150; 25 Am. Rep. 671; *Fowler v. Scully, supra; Seidenbender v. Charles,* 4

Serg. & R. 151; 8 Am. Dec. 682; *Brooks v. Cooper,* 50 N. J. Eq. 761; 35 Am. St. Rep. 793.)

"Applying these principles to the contract before us, it is most manifest that it is not only against the express prohibition of the law, but that the law makes penal upon the part of a public officer the entering into it. We can yield no assent to the contention that our laws apply only to express contracts. The statute itself is general in its terms."

In holding that it was immaterial that the legislature had attempted to confer conditional validity on such a contract by making the contract merely voidable, at the instance of the city, the court said, at page 129:

"The fact that the claim was allowed by the council does not give to it a validity which it otherwise did not possess. (*Santa Cruz Rock P. Co. v. Broderick,* 113 Cal. 628.) The duty of the treasurer is to pay only legal demands against his funds. The law will not imply a promise to pay for services illegally rendered under a contract expressly prohibited by law. (*Gardner v. Tatum, supra.*)"

The case of *Wread v. Coffey-Murray, Inc.,* 42 Cal. App. (2d) 783, lays down the same rule at pages 785 and 786.

The Warehouse Receipts Being Void No Rights Therein Passed to the California Bank as Pledgee.

In the present action, appellant is entitled to recover the value of its merchandise unless the defendant, California Bank, has a valid lien upon and a right to possession of it

at the time appellee delivered such merchandise to that defendant. The void warehouse receipts were impotent to confer any rights in that defendant, and appellee's delivery of such merchandise constituted a conversion. The bankrupt did not issue these void receipts. They were issued by its bailee, the appellee.

In *Hollywood State Bank v. Wilde,* 70 Cal. App. (2d) 103, void securities were pledged to that bank, and the court held that no rights whatever were conferred by such a pledge, regardless of the good faith or lack of knowledge on the part of the pledgee, of such invalidity. In holding that the pledgee could not invoke the defense of estoppel, the court said, at page 113:

> "It is statutory that while a non-negotiable written contract for the payment of money may be transferred by endorsement conveying thereby all rights of the assignor thereunder, yet it is 'subject to all equities and defenses existing in favor of the maker at the time of the indorsement.' (Civ. Code, sec. 1459.) From that section it must follow that there can be no estoppel by contract unless the contract is itself valid."

For other cases holding that good faith is immaterial, see:

> *Duntley v. Kagarise,* 10 Cal. App. (2d) 397;
>
> *Boss v. Silent Drama Syn.,* 82 Cal. App. 109; and
>
> *Reno v. American Ice Machine Co.,* 72 Cal. App. 409.

It Is Not Necessary That the Statute Expressly Declare the Instrument to Be Void.

The rule as to invalidity of contracts which contain provisions contrary to a criminal statute or which are executed in violation thereof, does not depend upon any statute expressly declaring them to be void. The instruments are void regardless of the non-existence of such an express declaration.

See:

Smith v. Bach, 183 Cal. 259;

Berka v. Woodward, 125 Cal. 119;

Napa Valley Elec. Co. v. Calistoga Elec. Co., 38 Cal. App. 477;

King v. Johnson, 30 Cal. App. 63;

Wise v. Radis, 74 Cal. App. 765;

Firpo v. Murphy, 72 Cal. App. 249;

Buffendeau v. Brooks, 28 Cal. 641;

Le Rosa v. Glaze, 18 Cal. App. (2d) 354;

Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal. App. 592;

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Shasta County v. Woody, 90 Cal. App. 519;

Young v. Laguna L. & W. Co., 53 Cal. App. 178;

6 California Jurisprudence (Contracts), at page 105; and

17 Corpus Juris Secundum at page 555.

There Is No Basis in Policy for the Rule Which the District Court Seeks to Establish.

The authorities thus far cited show that the purpose of the rule which invalidates all such instruments is not to provide a remedy to one party against another. It is predicated upon a doctrine of policy that no enforcement, relief or defense may be asserted which is based upon any rights asserted under an illegal contract.

See:

Hollywood State Bank v. Wilde, 70 Cal. App. (2d) 103 at 112;

Reno v. American Ice Machine Co., 72 Cal. App. 409 at 413;

Black v. Solano Co., 114 Cal. App. 170 at 176; and

Cecil B. DeMille Productions v. Wooley (9th Circuit), 61 F. (2d) 45 at 48.

These cases show that the courts treat the illegal contract as non-existent, and this is why they permit the recovery of money or other property that has passed pursuant to the terms of the void contract. Such right of recovery is not conferred by statute but it exists by virtue of the common law rules that allow recovery on the common counts. The basis of such recovery is the implied contract to compensate for the things obtained through the void contract.

See:

Randall v. California L. B. Syndicate, 217 Cal. 594 at 598;

Castle v. Acme Ice Cream Co., 101 Cal. App. 94;

Mary Pickford Co. v. Bayley Bros., Inc., 12 Cal. (2d) 501 at 519; and

Hertz Drivurself Stations v. Ritter (9th Circuit), 91 F. (2d) 539.

For this reason, appellant is entitled to recover the value of the merchandise delivered pursuant to the terms of the void warehouse receipts. The receipts, being void, the pledgee bank is in the position of a total stranger. (*Hollywood State Bank v. Wilde,* 70 Cal. App. (2d) 103.)

Appellant does not deny the power of the legislature to provide specific remedies to persons who have parted with value under an illegal contract, but these remedies must be consistent with the invalidity which flows from the illegality. The legislature cannot make a contract illegal and at the same time declare it to be valid. (*Berka v. Woodward,* 125 Cal. 119, and *Wread v. Coffey-Murray, Inc.,* 42 Cal. App. (2d) 783.)

Any remedy or relief provided by statute must, therefore, be predicated upon the proposition that the illegal contract is void. We do not need to concern ourselves with the question whether the legislature might have taken away the right of recovery by one who has parted with value under an illegal contract, because there is nothing in Section 1858f of the Civil Code which purports to limit a recovery of the character herein sought.

An express statutory provision for a particular remedy or relief does not destroy remedies and rights of recovery which already exist under the common law. (See *Estate of Ward,* 127 Cal. App. 347 at 354, and the numerous authorities cited therein.)

The most that the sentence in Section 1858f attempts to do is to express a right of recovery for anyone injured by such a warehouse receipt. It does not attempt

to confer either a limited or a complete validity on such warehouse receipt. If it had so attempted, the provision would have been subject to the same infirmity as the statutes that attempted to make such illegal contracts merely voidable.

See:

> *Berka v. Woodward* (*supra*), and
>
> *Wread v. Coffey-Murray, Inc.* (*supra*).

The decision of the District Court is therefore erroneous in that:

(1) It implies a legislative intent to declare an illegal contract valid;

(2) It implies such an intent in an instance where a fair construction of the statute does not evidence any such purpose;

(3) It assumes that the express provision in the statute for a recovery of damages to persons injured, takes away existing common law remedies.

The Warehouse Receipts Being Void Both Defendants Are Equally Liable.

It is of no consequence that the pledgee's lien of the California Bank would have been valid if the warehouse receipts had not been void. When a valid lien is not perfected prior to the four-month period preceding the bankruptcy the lien claimant acquires no valid rights to the property.

See:

In re Talbot Canning Corp., 35 Fed. Supp. 680, and 39 Fed. Supp. 858;

Kirst v. Buffalo Cold Storage Co., 36 Fed. Supp. 401;

In re Herksimer Mills Co., Inc., 39 Fed. Supp. 625;

Susquehanna T. & S. D. Co. v. U. T. & T. Co., 6 F. (2d) 179;

In re Silver Cup Bar & Grill, 50 Fed. Supp. 528;

In re Seim Const. Co., 37 Fed. Supp. 855;

Corn Exchange N. B. & Tr. Co. v. Klauder, 318 U. S. 434;

Arena v. Bank of Italy, 194 Cal. 195;

Chichester v. Commercial Credit Co., 37 Cal. App. (2d) 439; and

In re Boswell, 95 F. (2d) 239.

Sections 96(a), 96(b), 107(e) and 110(e) of 11 United States Code Annotated, specifically confer upon the trustee the right to recover the property or its value in instances such as this.

See also: 8 Corpus Juris Secundum (Bankruptcy), page 841.

The act of appellee in delivering the merchandise to the California Bank constituted a conversion within the above provisions, as well as under the law of this state.

See:

Section 10, Act 9059, General Laws of California; and

Aronson v. Bank of America, 9 Cal. (2d) 640 at 643.

There is no doubt that the defendant, California Bank, may participate in the assets of the bankrupt along with other general creditors, but it should have no advantages of a lien claimant where the lien is void. By the same token, appellee may have a claim against the California Bank to recover the value of the merchandise which appellee erroneously delivered to that bank, but we are not concerned with these remedies in this action.

The Authority on Which the District Court Predicated This Decision Is in No Way Pertinent.

The District Court based its decision upon the case of *Equitable Trust Co. v. A. C. White Lumber Co.* (D. C. Idaho), 41 F. (2d) 60. That case involved an Idaho statute requiring warehouse receipts to show the rate of storage charges on their face and the court held that the failure of the warehouse receipt to contain such recital did not invalidate the receipt but there was nothing in the case indicating that any criminal statute such as the California statute was involved. There was no mention whatever of the receipt being void because of the violation of a criminal statute so the case cannot operate as a precedent in the present case.

Even if there had been a criminal statute involved, the decision of that court would be predicated upon the Idaho law whereas the Idaho law cannot take precedence over the established California law in this case.

POINT II.

Section 1858b and 1858f of the Civil Code Being Criminal Statutes Were Not Repealed by the Adoption of the Uniform Warehouse Receipts Act.

The above sections of the Civil Code were adopted in 1905, whereas the Uniform Warehouse Receipts Act was adopted in 1909. This law as subsequently amended is embodied in Act 9059, Volume 3, Deering's California General Laws.

Section 2 of that act sets forth several requirements as to what warehouse receipts must contain. It includes the requirements specified in Section 1858b of the Civil Code.

Section 2 of Act 9059 provides:

> "Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms—
>
> "(a) The location of the warehouse where the goods are stored,
>
> "(b) The date or issue of the receipt,
>
> "(c) The consecutive number of the receipt,
>
> "(d) A statement whether the goods received will be delivered to the bearer, or to a specified person, or to a specified person or his order,
>
> "(e) The rate of storage charges,
>
> "(f) A description of the goods or of the packages containing them,
>
> "(g) The signature of the warehouseman, which may be made by his authorized agent,
>
> "(h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly

or in common with others, the fact of such ownership, and

"(i) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred and the purpose thereof is sufficient.

"A warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of any of the terms herein required."

There is nothing contained in that section that is repugnant to the provisions of Section 1858b of the Civil Code. The difference arises in that Section 2 of the Act sets forth additional requirements, and in the further fact that the Uniform Warehouse Receipts Act (Act 9059) is in no sense a criminal statute. It contains no language making a violation of any of its provisions a crime.

The provisions contained in Sections 1858 to 1858f of the Civil Code are definitely regulatory and penal in character in that the last section makes violation of any of the other sections a felony. This is in no way repugnant to the Uniform Warehouse Receipts Act, but is additional matter not covered by that Act.

Section 60 of the Uniform Act provides:

"All acts or parts of acts inconsistent with this act are hereby repealed."

It will be noted that this is not an express repeal of all other laws relating to warehousing. It is only a repeal of any other laws that may be *inconsistent.*

It should also be observed that Section 56 of that Act evidences an intent to preserve any other laws which for any reason might result in a warehouse receipt being invalid.

That section provides:

> "In any case not provided for in this act, the rules of law and equity, including the law-merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or *other invalidating cause,* shall govern." (Italics ours.)

In *People v. Carter,* 131 Cal. App. 177, the court stated the general rule that repeals by implication are not favored in law. It then proceeded to state the strict requirements for such a repeal by implication, at page 181, as follows:

> "But the decisions also clearly indicate that, unless the object or the purpose of the *quasi*-repealing statute is identical with that of the statute claimed to be so repealed, the effect is not that a repeal has been effected; but, to the contrary, unless, in addition thereto, such statutes are repugnant one to the other, or the provisions of the later statute are inconsistent with those of the earlier statute, each of such statutes will remain as a declaration of the law which purportedly is declared therein. (23 Cal. Jur. 693 *et seq.;* Sec. 325, Pol. Code.)"

Before a repeal by implication can be operative, it is also necessary that the objects of the two statutes must be identical and co-extensive.

See:

Napa State Hospital v. Yuba County, 137 Cal. 378 at 383;

People v. Platt, 67 Cal. 21 at 22;

22 California Jurisprudence (Statutes), Section 85 at page 698; and

59 Corpus Juris (Statutes), Section 520 at page 921.

There can be no repeal by implication for each of the following reasons:

(1) There is nothing in the Civil Code section that is inconsistent with or repugnant to the provisions of the Uniform Warehouse Receipts Act; and

(2) The objects of the two laws are neither identical nor co-extensive. One imposes criminal sanctions and the other does not.

POINT III.

The Reference in the Warehouse Receipts to a Contract and a Lease Did Not Meet the Statutory Requirement That the Rate of Storage Charges Appear on Their Face.

The nearest approach to compliance with the provisions of Section 1858b of the Civil Code is the following clause on the face of the receipts:

> "Subject to lien for storage, handling, insurance and *other charges* as per contract and lease with the industry served." (Italics ours.)

At the outset, it should be noted that reference to this contract and lease is not made for the purpose of ascertaining the rate of storage charges per month or per season. "Storage" is mentioned first following the word "lien," but no rate or amount is shown. It is the "other charges" that reference is made to the contract and lease for.

The affidavit of E. C. Yuille filed in support of the motion for summary judgment has attached to it a photostat of the contract to which it is claimed the receipts refer. [R. 43-48.] This is a field warehousing agreement between appellee and the bankrupt, dated November 14, 1945, in which the bankrupt is referred to as "the depositor" and the appellant as "Lawrence."

The language therein as to charges is as follows:

> "3. The depositor agrees to pay to Lawrence for conducting such field warehouse or warehouses, and for storing commodities therein, the following:

"Storage Charges:

"Furniture Manufacturing Materials:

"One tenth of one percent (1/10 of 1%) of value of commodities stored per calendar month or fraction thereof. The second party agrees to report to the first party the values of commodities for which warehouse receipts are issued.

"Location Charge:

"$250.00 per year to cover the cost of Fidelity bonds on warehouse employees, regular examinations, supplies, etc., payable upon the issuance of the first warehouse receipt or other evidence of deposit and annually thereafter.

"Premiums for insurance on commodities represented by outstanding insured warehouse receipts as provided in the 'Insurance Agreement' signed by the depositor and Lawrence.

"The storage charges above set forth are subject to an annual minimum payment of Two Hundred Fifty Dollars ($250.00) payable on the date of this agreement and annually thereafter on the same day of each succeeding year during the term of this agreement. Storage charges accruing in excess of minimum payable on or before ten (10) days after date of invoice.

"The actual cost incurred by Lawrence for all employees required by Lawrence in the conduct of said warehouse or warehouses, and in the storing and handling of commodities therein, plus ten percent (10%), payable on or before ten (10) days after date of invoice, such ten percent (10%) to be deducted if all invoices are paid when due.

"All license fees, taxes or charges levied or imposed by Federal, State, County or Municipal Gov-

ernments or governmental agencies upon the operation of said warehouses, payable upon presentation of invoice.

"At Cost for installation, preparation of documents, etc., non-recurring, payable in advance.

"Regular warehouse examination, $................ annually, payable in advance.

"Special examination at cost, payable upon presentation of invoice.

"All expenses including attorneys' fees incurred by Lawrence incident to conducting any warehouse under this agreement, maintaining possession of the warehoused commodities for the benefit of warehouse receipt holders and the depositor, and in connection with any litigation in which Lawrence or the depositor is a party, payable upon presentation of invoice." [R. 45-46.]

Even if all these provisions had appeared on the face of the receipts, they would not have met the requirements of the statute as they do not show any rate of such charges per month or per season. Instead, they obligate the bankrupt to pay a number of diversified charges to be determined by various future contingencies.

The provisions of the statute are specific. They require the rate to be shown on the face. Assume that this contract had shown the rate, there would still be no compliance. The courts have uniformly construed the word "face" to mean in the instrument itself—not in some other instrument.

See:

Cunningham v. Great So. Life Ins. Co., Tex. Civ. App., 66 S. W. (2d) 765 at 773;

Southern Mut. Ins. Co. v. Trunley, 100 Ga. 296, 27 S. E. 975;

In re Stoneman, 146 N. Y. S. 172 at 174;

Investors Syn. v. Willents (D. C. Minn.), 45 F. (2d) 900 at 902; and

Burns v. Corn Exch. Natl. Bk. of Omaha, 33 Wyo. 474, 240 Pac. 683 at 687.

This no more closely approaches compliance than if the warehouse receipt has referred to the company's books of account for information as to the storage charges.

The Clear Statutory Requirement Can Not Be Relaxed by Judicial Construction.

The fact that the appellee attempted to relax the statutory requirement to fit more conveniently into its plan of field warehousing adds no mitigation. One of the reasons for statutes governing warehousing is to prevent warehousing from becoming a mere fiction to employ the cloak but not the substance in obtaining credit.

See:

McCaffery C. Co., Inc. v. Bank of America, 109 Cal. App. 414;

Harry Hall & Co. v. Consol. Packing Co., 55 Cal. App. (2d) 621;

First Camden Natl. Bank & Trust Co. v. J. R. Watkins Co., 122 F. (2d) 826; and

Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. Ed. 1143.

In recognition of the legislature's power to determine the economic policy or necessity behind a statute the court in *Max Factor & Co. v. Kunsman,* 5 Cal. (2d) 446, said, at page 455:

> "As already indicated, the state legislature, by the adoption of the Cartwright Act, *supra,* adopted in 1907, partially, at least, the first economic policy above discussed. By the enactment of the Fair Trade Act in 1931, as amended in 1933, the state legislature, for reasons known to it and which we must presume were sufficient, has seen fit to attempt to change its former policy, and to adopt the second economic concept above discussed. In so far as the statute involves a mere change in the economic policy of the state, this court has no power or right to interfere. The members of the court may or may not agree with the economic philosophy of the Fair Trade Act, but it is no part of the duty of this court to determine whether the policy embodied in the statute is wise or unwise. It is primarily a legislative and not a judicial function to determine economic policy. The power of the court is limited to determining whether the subject of the leglislation is within the state's power, and if so to determine whether the means adopted to accomplish the result are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained. These principles have frequently been stated by the United States Supreme Court."

See also:

In re Lasswell, 1 Cal. App. (2d) 183.

There are many instances of invalidity where the violation was much more technical than in this case.

See:

Coast Amusements, Inc. v. Stinman, 115 Cal. App. 746;

Parrish v. Am. Ry. Emp. Pub. Co., 83 Cal. App. 298;

Nat. Stone & Tile Co. v. Voorheis, 93 Cal. App. 738;

Domenigoni v. Imperial Live Stock & Mg. Co., 189 Cal. 467;

Jones v. Balboa Motor Corp., 206 Cal. 98;

Becker v. Steinman, 115 Cal. App. 740;

Live Oak Cemetery Assn. v. Adamson, 106 Cal. App. 783;

Castle v. Acme Ice Cream Co., 101 Cal. App. 94; and

Otten v. Riessener Chocolate Co., 82 Cal. App. 83.

This violation is explicit and direct, and the consequences of invalidity are, therefore, automatic.

Conclusion.

There is no basis upon which appellee can escape the legal consequences of its act, and it is respectfully submitted that the judgment should be reversed.

Craig & Weller,

McLaughlin, McGinley & Hanson,

By James A. McLaughlin,

Attorneys for Appellant.